Date: MAY 12, 1992

In the Matters of

AMERICAN CHICK SEXING ASSOCIATION
and
ACCU-CO,
Employer

on behalf of	Case Nos.:
YONG HYUN CHO	89-INA-320
WOON SIK KANG	89-INA-321
JEUNG-CHIL KIM	89-INA-322
SOO-IL LEE	89-INA-323
HYUN RYAI SHIN HONG	89-INA-324
SOO SEOUK LEE	89-INA-325
JUN HWAN KO	89-INA-326
KYU HAN KIM	89-INA-327

Aliens

Appearance: Jane W. Goldblum, Esquire
Philadelphia, Pennsylvania

BEFORE: Brenner, De Gregorio, Glennon, Groner,
Guill, Litt and Romano
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. The panel Decision and Order in this matter, dated March 12, 1991, is hereby reinstated and affirmed in all respects. Nothing in the panel's decision bars the Certifying Officer on remand from requiring any necessary certifications by officials of Accu-Co on amended application forms.

IT IS THEREFORE **ORDERED** that the panel's Decision and Order dated March 12, 1991 is **REINSTATED** and **AFFIRMED**.

Washington, D.C.

Entered at the direction of
the Board:

by: Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

J. Guill, with whom J. Glennon and Groner join, dissenting.

Accu-Co is offering a different job opportunity from the one that was offered by American Chick Sexing Association (Amchick), and therefore Accu-Co should be required to file its own applications for labor certification.

In these matters, Amchick filed the applications on behalf of the Aliens, but was careful not to be identified as their employer. The chick sexors were to be independent contractors working for Amchick hatcheries. The CO issued an NOF, denying certification on the ground that the relationship between Amchick and the chick sexors was not an employment relationship.

Mr. Nitta, the sole proprietor of Amchick, attempted to rebut by amending the applications to delete the contractor relationship with Amchick, and adding a new applicant "Accu-Co," which would have a traditional employment relationship with the chick sexors. Mr. Nitta is also the sole shareholder of Accu-Co. The CO concluded that there has to be an "employer" at the time of the application, and denied certification. The BALCA panel disagreed with the CO, and remanded for re-recruitment.

The panel cited International Contractors, Inc. and Technical Programming Services, 89-INA-278 (June 13, 1990) as authority for allowing the transfer of interests from Amchick to Accu-Co. International Contractors, Inc. (ICI) and Technical Programming Services (TPS) were companies which provided the alien's services to NEC America. Although ICI initially applied for labor certification, the panel held that TPS properly replaced ICI, where the employment opportunities with NEC America and the job location remained the same (despite the change in contractors). The decision, however, also noted that "[w]hile a change in employers might ordinarily necessitate a reapplication for certification, in this case the change in petitioners has had no effect on the job opportunity whatsoever." Thus, "employers" may properly transfer interests in the labor applications if the job opportunity and the area of intended employment do not change (see §656.30(c)(2)).

The panel in the present matter reasoned that since the aliens "will occupy the same positions, perform the same duties, work in the same area of intended employment, and earn the same salaries with Accu-Co as they would have with Amchick," neither the particular job opportunity nor the area of intended employment had been changed in violation of §656.30(c)(2).

The panel did note, however, that the aliens (or potential U.S. applicants) would now enjoy additional benefits such as eligibility for social security and unemployment benefits and vacation / sick leave. It also seems likely that the workers' salaries will change, as their take-home pay may be affected by the withholding of taxes. It was because of these changes that the panel remanded the case to the CO for new recruitment.

Employment of an independent contractor and employment of an employee, no matter how similar the work, involves a fundamentally different type of employment relationship. As even the majority recognizes, the job opportunity had changed significantly enough to require a new recruitment. Furthermore, it must be questioned whether new recruitment would cure the rejection of U.S. applicants during the initial processing of this application; three workers may have rejected or not responded to the job offer because of the "type of job" it was, namely a subcontractor position.

It also must be questioned whether this is properly considered a "transfer" of interests when Amchick admittedly never held such obligations prior to the transfer. The interests, and the very nature of the job opportunity, were created when Accu-Co was created. Therefore, while companies may transfer interests in labor applications where the job opportunity and area of employment do not change, here the job opportunity has significantly changed.

In sum, Accu-Co should be required to file a new application for its fundamentally different job opportunities.